No. 20334

IN THE

United States Court of Appeals For the Ninth Circuit

J. A. Woodworth and B. D. Elliott,
Appellants,

v.

Tacoma Yacht Club,
Appellee.

Appeal from the United States District Court for the Western District of Washington, Southern Division

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Honorable George H. Boldt, *Judge*

BRIEF OF APPELLANTS

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STATEMENT OF JURISDICTION

This is an appeal from the final decree of the United States District Court for the Western District of Washington, Southern Division, sitting in Admiralty, dismissing the appellants libel on the basis of an alleged hold-harmless or indemnity provision after finding that the negligence of the appellee's servants had caused the loss of appellants' boathouse and other damage.

The jurisdiction of the District Court is conferred by

the provisions of Title 28, USCA, Sec. 1333, which vests jurisdiction of all Admiralty causes in the United States District Courts (Tr. Vol. I, 25-26).

The jurisdiction of this Court is conferred by Title 28, USCA, Sec. 1291, which gives this Court jurisdiction of all appeals from final decrees of District Courts.

STATEMENT OF THE CASE

The appellants are J. A. Woodworth and B. D. Elliott of Tacoma, Washington. At the pertinent times during December, 1961, Mr. Woodworth was owner of the cabin cruiser *Vaja* and Mr. Elliott was the owner of the cabin cruiser *Leilani.* These two boats were kept in a floating boathouse which was owned jointly by the appellants. Both appellants were members of the appellee Yacht Club and rented moorage space for their boathouse from the appellee.

Through their libel filed in the Court below, the appellants claimed damages for the loss of their boathouse and for damage to the two cabin cruisers moored therein when the boathouse drifted into the open waters of Puget Sound on December 17, 1961. Appellants libel claimed, and the Court below found, that the appellants' boathouse had been permitted to go adrift to its destruction through the negligence of the appellee Yacht Club's employees (Tr. Vol. I, 58-59). However, the Trial Court further found that the appellee was shielded from liability by the language of an indemnity or "hold-harmless" provision contained in its membership application form.

By this appeal, the appellants submit that the Trial Court was distinctly in error in concluding that the provision of the Yacht Club's membership application form advanced by the appellee operated to shield it from liability for the loss of appellants' boathouse, and the coincident damage to their boats.

Tacoma Yacht Club Moorage

The Tacoma Yacht Club is situated adjacent to the waters of Commencement Bay, an arm of Puget Sound (Tr. Vol. I, 24). The Yacht Club leases the entire basin (formed by an off-shore slag pile of the American Smelting & Refining Company) from the Tacoma Park Board (Tr. 12). In turn, the appellee subleases approximately the southwestern one-third of that basin to Mr. Charles W. Mojean for use as a moorage open to the public and for a public marine gasoline and oil sales facility (Tr. 12, 88-90). Mojean's public area of the basin is operated as an entity which is entirely independent of the Yacht Club except for his payment of rent under his sublease from the appellee Yacht Club (Tr. 88-93). The remainder of the basin is operated by the Yacht Club for its clubhouse and moorage facilities, including areas rented to members for moorage of their vessels.

For some months prior to December, 1961, the appellants rented a designated moorage space from the Yacht Club for their floating boathouse. The appellants' cruisers, *Vaja* and *Leilani*, were moored in the boathouse which also stored other equipment associated with the appellants' boating activities. In turn, the boathouse was secured in the mooring area by chains of 5/16th inch metal,

spiked into the boathouse on one end, and to the Yacht Club's mooring pilings on the other (Tr. Vol. I, 26).

Movement of Appellants' Boathouse By Appellee's Employees

On December 14, 1961, Lamont C. Doty, the appellee's professional manager, and two other employees of the Yacht Club, working under his supervision, severed the chain moorings of the appellants' boathouse and towed it away from the moorage place rented by the appellants (Tr. Vol. I, 27). The boathouse was towed by Manager Doty's cabin cruiser through means of a line secured about the handrailing at the forward end of the boathouse (as distinguished from the after or open end, through which the boats exited) (Tr. 18). The boathouse was taken from the Yacht Club moorage area to the public gas float operated by Charles Mojean, where it was tied up by use of two ¾-inch-diameter manila lines from the gas float to the forward end of the boathouse (Tr. Vol. I, 27). Appellee's employees state that two additional ½-inch-diameter ropes were tied from the after end of the boathouse to finger floats in Mojean's public moorage area. Thereafter no one altered the lines or in any other way changed the manner in which the boathouse was secured to Mojean's float (Tr. Vol. I, 27-28).

The Trial Court found that neither appellant authorized the movement of their boathouse by the appellee. Furthermore, the Court found that neither appellant had specific advance notice of the movement nor notice of

the place where the boathouse was to be located after it was moved (Tr. Vol. I, 58).

Loss of the Appellants' Boathouse

A wind storm arose on the evening of December 16, 1961. Available records indicate that gusts reached 35 miles per hour at Seattle-Tacoma Airport and 45 miles per hour at Seattle (Ex. 1, F and G). At 6:30 a.m. on December 17, the appellants' boathouse was discovered to be missing from the temporary moorage at which it had been secured by appellee's employees. At approximately 8 o'clock a.m. the boathouse was sighted floating in the waters of Puget Sound about 7 miles east northeast of the Yacht Club (Tr. Vol. I, 28). Appellants' yachts, *Leilani* and *Vaja,* were still tied inside the boathouse. Thereafter the yachts were removed from the boathouse by the United States Coast Guard and employees of the appellee. The yachts and the boathouse were separately taken in tow in order to return them to shelter. However, the boathouse broke apart by action of the waves, lost its floatation and became a total loss. Its wreckage drifted ashore near the position at which it initially had been sighted at 8:00 a.m. (Tr. Vol. 5, 28). The two yachts were damaged by the action of the waves in the open waters of Puget Sound, but were returned to the vicinity of the Tacoma Yacht Club (Tr. Vol. I, 28, Tr. 110).

Membership Application—Hold-Harmless Provision

The Trial Court found that the damages suffered by the appellants were proximately caused by the neg-

ligence of the appellee's employees (Tr. Vol. I, 58-59). Nevertheless, it exonerated the appellee Yacht Club from liability on the basis of an exculpatory or indemnity provision of the Yacht Club's membership application. In pertinent part that provision reads:

> "As partial consideration for membership applied for I hereby agree that I will save the Tacoma Yacht Club harmless from any and all liability in the event of damage and/or loss of any kind or description whatsoever to my boat or other equipment while the same is moored and/or located upon the premises of said Yacht Club . . ." (Tr. I, 51; Ex. D).

A membership application with the provision set forth above was signed by appellant Woodworth, but there was no evidence that such an agreement was signed by appellant Elliott (Tr. Vol. I, 57). The Yacht Club's application for moorage (Ex. E) also contains a provision which employs "hold-harmless" language. However, that provision is specifically limited to damage caused by the operation of the smelter which lies adjacent to the Yacht Club and does not apply here.

SPECIFICATIONS OF ERROR

Specification No. 1

The Court erred in its entry of Conclusions of Law IV and V in concluding that the appellee was not liable to the appellants because of the non-liability or indemnity provision of its membership application form.

Specification of Error No. 2

As to appellant Elliott, the Trial Court erred in its Conclusions of Law IV and V in failing to allow recovery for his damages because of the provisions of the appellee's membership agreement in view of the Court's Finding of Fact VII that there was no evidence that he ever signed such an agreement.

Specification of Error No. 3

The Trial Court erred in its Finding of Fact V that the public moorage operated by Charles Mojean is a part of the premises of the appellee Yacht Club.

Specification of Error No. 4

The Trial Court having found that the appellee Yacht Club's employees moved the appellants' boathouse and boats without the appellants' knowledge or permission and thereupon negligently moored the same, proximately causing the damage suffered by libelants, the Court erred in its Findings of Fact, Conclusions of Law and its Judgment (Decree), in holding that the appellee is not liable to the appellants.

SUMMARY OF ARGUMENT

The appellants submit that the hold-harmless or exculpatory provision of the appellee's membership application form should not have operated so as to allow the appellee Yacht Club to insulate itself from liability under the facts established in the instant case. The appellants specifically submit that the non-liability provision raised by the appellee was improperly applied by the Trial

Court for each of the following reasons: (1) Under the rule of construction properly applied to indemnity or non-liability provisions, the language advanced by the appellee Yacht Club is not sufficient to relieve it from liability for its own negligence; (2) Upon the evidence, it is clear that the appellants' boats and boathouse were not damaged "on the premises of the Tacoma Yacht Club," but rather on the waters of Puget Sound, and that the "hold-harmless" provision advanced by the appellee by its own terms does not apply to the present cause; (3) By moving appellants' boathouse without permission, the appellee Yacht Club cloaked itself with the duty of bailee. Under the law and public policy of this jurisdiction while standing in that capacity it may not raise a contractual agreement to relieve itself of its liability for its own negligence; and (4) By exercising control over the appellants' boathouse and boats in moving them without the appellants' knowledge or permission, and then allowing the appellants' boathouse to go adrift to its damage and destruction, the appellee Yacht Club converted the same and should be held strictly liable to the appellants.

Each of these rules could, and should, have been applied by the Trial Court in order to reject the non-liability provision raised by the appellee in its defense.

Requirement of Strict Construction of Indemnity or Exculpatory Provisions

There can be no doubt that the law requires an indemnity or hold-harmless provision to be construed most strictly against a party raising such a provision in order

to insulate itself from the effect of its own negligence. Thus, in *United States v. Wallace,* 18 F.2d 20 (1927), this Court stated at page 21:

> "The established principle is thought to be that general words alone do not necessarily impart an intent to hold an indemnitor liable to an indemnitee for damages resulting from the sole negligence of the latter; it is but reasonable to require that an obligation so extraordinary and harsh should be expressed in clear and unequivocal terms . . ."

Also see *Ocean Accident & Guarantee Corporation v. Jansen,* (8 Cir. 1953), 203 F.2d 682, and *Sinclair Prairie Oil Company v. Thornley,* (10 Cir. 1942), 127 F.2d 128. This general rule that a tort feasor may only shield himself from liability to an injured party by contract if the language unequivocally indicates that it is intended to accomplish that end is firmly accepted in admiralty. *The Wash Gray,* (1928), 1928 AMC 923, 277 U.S. 66, 72 L.ed. 266. A most recent example of the application of this strict rule of construction in an admiralty cause appears in *David Crystal, Inc., v. Cunard Steamship Co.,* (2 Cir. 1964), 339 F.2d 295. In that case the Court held a warehouseman accountable for a loss of goods because of what was shown to be a "misdelivery," as that term is technically defined. In so holding the Court refused to release the warehouseman from liability under a provision of its contract discharging specific acts of its own negligence including "errors in delivery," since, under strict construction, the "misdelivery" was not an "error in delivery." The Second Circuit stated that "such disclaimers are not favored by the courts and must be strictly construed."

The Appellee Yacht Club's Hold-Harmless Provision Does Not Relieve It of Liability For Its Own Negligence

The provisions of appellee Yacht Club's membership application do not specifically provide that the Yacht Club is to be released from liability for damage arising from its own negligence. Such an explicit release of liability is required in admiralty for such disclaimers to be effective. *Wash Gray, supra; David Crystal, Inc., v. Cunard Steamship Co., supra.*

Thus, in *United States v. Wallace, supra,* an admiralty cause, this Court considered the following language indemnifying a shipowner:

> "The contractor is to fully protect the ship and the owners against any and all claims for injury to workmen engaged by him or his subcontractor, in carrying out work on the vessel."

Following the pertinent rule of strict construction of such provisions, this Court held that such an undertaking would not release the shipowner from liability for injuries caused solely by the shipowner's own negligence. This Court quoted with approval from *North American Ry. Const. Co. v. Cincinnati Traction Co.,* (7 Cir. 1909) 172 Fed. 214:

> "'. . . Indeed it would take clear language to show that a contract of indemnity was intended to cover conditions or operations under the control of the party indemnified and not under the control of the indemnifying party, such, for instance, as accidents, the proximate cause of which is the negligence of the party indemnified.'"

Furthermore, by the *Wallace* opinion, this Court in admiralty significantly adopts the case of *Perry v. Payne,* 66 Atl. 553, 11 LRA 1173, 10 Anno. Cas. 589 (Sup. Ct. Penn. 1907). In that leading case, the Supreme Court of Pennsylvania, considering an indemnity or exculpatory provision, held that every presumption is against an intention to contract for immunity for not exercising ordinary diligence in the transaction of any business, and that "No inference from words of general import can establish it." (11 LRA 1173 at 1178).

The appellants submit that, without presumption and inference, the non-liability provision brought into question in this case does not exempt appellee's liability to the appellants. We believe that it is clear by review of the wording that the Trial Court relied upon in reaching its conclusions (Tr. Vol. I, 57) that the appellee Yacht Club should not be shielded from liability for its own negligence.

The Damage Suffered By the Appellants Did Not Occur on the Premises of the Yacht Club

If one were to accept for purposes of argument that the exculpatory provision of the Yacht Club's membership application was adequate to shield it from its own negligence, that provision expressly restricts its application to damage occurring while the appellants' vessels were moored or located on the Yacht Club's premises.

Black's Law Dictionary (4th Edition) defines "damage" as the "loss, injury or deterioration caused by the negligence, design or accident of one person to another in respect to the latter's property."

By the admitted facts in this cause (Tr. Vol. I, 28)

it is clear that the appellants' boathouse and boats suffered damage, not while moored or located on the premises of the Tacoma Yacht Club, but while afloat in the waters of Puget Sound some distance from the club. In fact, the evidence is clear that the appellants' boathouse eventually broke apart and was washed ashore several miles from the club's facilities.

The appellee might have expressly relieved itself from all liability for any damage to appellants' property no matter where that property was situated at the time of its loss. However, the printed membership application form drafted and employed by the appellee specifically applies only to liability for damage occurring while the vessels were located on the premises of the Yacht Club. We submit that the law does not permit a hold-harmless provision expressly applicable to a certain geographical location to be interpreted broadly so as to apply to other locations as well. This point was considered in a recent decision of the Washington State Supreme Court, *Feigenbaum v. Brink*, (Sup. Wash. 1965) 66 Wn.2d 117, 401 P.2d 642, wherein the Court stated:

> "In the absence of unequivocal language, the nonliability provision of a contract will not be extended to include areas not specifically described."

Thus, the appellants believe that it is clear, even in the broadest interpretation that can be given to the words employed by the appellee Yacht Club, that the damage suffered by the appellants did not occur on the premises of the Yacht Club. Therefore, appellants submit that it must follow that the Trial Court was in error in apply-

ing that hold-harmless wording to the circumstances of the present cause.

Although the appellants submit that this cause should be resolved upon the fact that the damage to their vessels was incurred on the waters of Puget Sound, the Trial Court attached some importance to the fact that the appellee's negligence arose at the public gas dock which was operated by Mr. Charles Mojean within the Yacht Club basin. The appellants believe that on the evidence the Court was in error in finding that the area of the yacht basin, subleased to Mojean, was the "premises" of the appellee Yacht Club for the purpose of construction of its hold-harmless provision (Tr. Vol. I, 56-57).

Both witnesses Mojean and Doty testified that the area of the public moorage and "gas dock" operated by Mojean was subleased to him by the Yacht Club. Their testimony indicated that Mojean ran a private business unrelated to, and uncontrolled by the Yacht Club. The relationship of the Yacht Club to Mojean's business is concisely stated by Mojean's own testimony:

"Q. (By Mr. Giese) Every activity you pursue in any way concerning your public gas float is entirely independent of the Yacht Club?

"A. (By Mr. Mojean) That is right, sir." (Tr. 90)

The term "on the premises of" is a phrase of restricted meaning. As applied to the location of a business, in normal usage the phrase refers to that area where the business is conducted and does not apply to adjoining property, even if owned by the same party. *Hopkins v.*

State Industrial Accident Commission, (Sup. Ct. Ore. 1938), 83 P.2d 487, 491, 160 Ore. 95; *Mangold v. American Ins. Co. of Newark, N. J.,* (Sup. Ct. Nebr. 1916), 157 N.W. 632, 99 Nebr. 656. And the phrase "on the premises of" excludes adjacent property not under control of the designated party. *Treasure Island Catering Co. v. State Board,* (Sup. Ct. Cal. 1940), 120 P.2d 1, 3, 19 Cal. App.2d 181; *Cohen v. Simon Strauss,* (N. Y. Sup. 1913), 193 NYS 929, 931. In the latter case a space three feet below the floor of one tenant's rented area was held to be the premises of another tenant, and therefore outside the premises of the first.

In *Vairada v. State,* (Wisc. Sup. 1923), 195 N.W. 937, 182 Wisc. 309, the Court considered the relation of the term "on the premises" (as employed in a criminal statute) to a lessor's interest in a leased or subleased premise. There it was held that the sublet area would not be the "premises" of the lessor unless he continued to exercise dominion and control over that area to the extent of freely carrying on his business there.

The appellants submit that the Court erred in not finding that the premises of the appellee did not extend to the area subleased to Charles Mojean.

Appellee's Liability In Bailment

Again accepting for purposes of argument that the exculpatory provision of Yacht Club's contracts would effectively relieve it of responsibility for its own negligence, the appellee stood as a bailee of appellants' vessels. In that capacity the law of the State of Washington prevents the appellee from enforcing its hold-

harmless provision, as a matter of public policy.

A corporation taking custody of a vessel for purposes permitting a benefit to it becomes the bailee of that vessel. *Guard*, (9th Cir. 1935) 1936 AMC 250, 79 F.2d 802; *Yacht Mable H.*, (SD Ala. 1960), 1961 AMC 1299, 187 Fed. Supp. 528; *Lackritz v. Petersen*, (SDNY 1940), 31 Fed. Supp. 415.

While appellee may take the position that it was merely a rentor or lessor of space and was not a bailee, it is clear that, by moving the appellants' vessels without notice or permission, the appellee became a bailee. An exactly parallel situation was considered by courts of the State of Louisiana in *LeWallen v. Board Levee Com'rs. of Orleans L. Dist.*, (La. App. 1964), 166 So.2d 566. The facts in the *LeWallen* case involving damage to an airplane are surprisingly analogous to those of the present cause. For that reason we would indulge in a quotation of some length from pages 567 and 568 of that opinion:

> "This suit was brought for recovery of damages based upon the allegation that the defendants became bailees of the airplane when they moved it to the new location, and that as bailee for their own benefit and convenience they owed a duty of protection of plaintiffs' property which they did not owe as lessors of rented space. It is charged that defendants were negligent in that they did not tie down the plane adequately and, specifically, that old and rotten ropes of insufficient size were used. Further, plaintiffs allege that United States Weather Bureau had issued a warning of the possibility of severe winds in the area in sufficient time for defendant to take precautionary measures, but that none were taken.

"The defendant Board of Levee Com'rs. denies that a contract of bailment existed, but rather one of lease and that it owed no duty of protection of plaintiffs' property as a bailee or as a depositary. It also denied negligence in moving the plane or in the manner it was tied down. Defendant further pleads the negligence of plaintiff Munson who was aware of the plane's removal and inspected it on the new location without complaint of the manner in which it had been secured to their tie-down rings, and who, in effect, acquiesced in all the defendant's employees had done. Plaintiffs deny their contributory negligence, asserting that they had a right to rely on the airport authorities who are presumed to be experienced in such matters.

* * *

"In order to determine what duty defendant owed plaintiffs for protection of their plane, it is necessary to ascertain the nature of the contract between them. Initially there was a simple contract of lease of space for storage of plaintiffs' plane. Such contracts appear to be common and in due course of the operations of the airport. *When the defendant's employees took it upon themselves to move the plane to a different location, one of their own choosing, for their own convenience or benefit, the contract then became one of bailment.* The defendants put themselves in a position analogous to an automobile parking lot or storage garage which exercises control over the vehicle left in storage."

The law of the State of Washington is in agreement with the general rule as stated by *LeWallen v. Board of Levy Com'rs., supra.* Thus, in *Spare v. Belroy Housing Corporation,* 179 Wash. 385 (1935), landlord Belroy contended that he merely leased space for tenants to park their automobiles. On evidence that the automobiles were moved by the landlord's employee it

was held that such action had caused a bailment of the autos in question to the landlord.

The appellants submit that on its facts the present cause falls squarely within this rule, creating a bailment in appellee as to their vessels at the time of their damage. Thus, under the law of this jurisdiction the hold-harmless or exculpatory provisions of appellee's membership contract would be invalid.

> "It is well settled that a bailee may be contract exempt himself from liability *except for his own fraud or negligence.*" *Patterson v. Wenatchee Canning Co.*, 59 Wash. 556, at 558 (1910).

This rule is firmly established as the law of the state. *Frank Althoff v. System Garages, Inc.*, (Sup. Wash. 1962) 59 Wn.2d 860, 371 P.2d 48; *Ramsden v. Grimshaw*, (Sup. Wash. 1945) 23 Wn.2d 864, 162 P.2d 901; *Sporsem v. First Nat. Bank*, (Sup. Wash. 1925), 233 Pac. 641, 133 Wash. 199.

Appellee's Absolute Liability in Conversion

The Trial Court found that the appellee's employees moved the appellants' boathouse without permission. Thereafter, the appellants' boathouse went adrift from the temporary moorage because of the appellee's negligence and was totally lost while the boats moored therein were damaged. Appellants submit that under these facts the appellee has converted the appellants' property and would be absolutely liable for the resultant damages. See Restatement of Torts, Sec. 227 (1), and leading cases as to conversion in this context such as *Ryan v. Chown*, 125 NW 46 (Sup. Ct. Mich. 1910).

The rule of conversion of property by a holder

through unauthorized use is recognized in admiralty. It has been held that taking possession of a vessel without authority of its owners, and the subsequent destruction or disposition of it, is a conversion permitting damages to the owner. *Grauwiler v. King,* (EDNY) 1955 AMC 1236, 131 F. Supp. 630, affd. (2d Cir.) 1956 AMC 319, 229 F.2d 153; *J. Oswald Boyd,* (ED Mich.), 1944 AMC 543, 53 F. Supp. 103.

Inapplicability of Non-Liability Provision as to Appellant Elliott

The evidence indicated, and the Court specifically found (Tr. Vol. I, 57), that appellant Elliott had not executed a membership application form incorporating the language upon which the appellee relies. It would seem that the appellee thereby failed in its burden of proof that the language in the membership application form could validly apply to its liability to Mr. Elliott. Furthermore, by analogy to the Statute of Frauds, the Trial Court committed error in implying that an agreement between appellant Elliott and the appellee incorporated a provision indemnifying the Yacht Club for its own negligence. Such an agreement would be a contract to answer for the "default" of another which is void under the Statute of Frauds. (In the State of Washington, RCW 19.36.020.) It is clear that an oral or implied agreement to answer for the torts of another is invalid and unenforceable. *Baker v. Morris,* (Sup. Kans. 1885), 7 Pac. 267, 33 Kans. 580; 31 CJS Statute of Frauds, Sec. 13; Corbin on Contracts, Sec. 247, pgs. 216-217.

CONCLUSION

The appellants believe that the result in the Trial Court is in error to the extent that it permits the respondent Yacht Club to exculpate itself from the effects of its own negligence through the provisions of its membership application. Any of several alternative rules of law should have been applied by the Trial Court, to avoid the application of the non-liability language of the Yacht Club's membership form:

(1) The exculpatory language of the membership application was insufficient to constitute a contract allowing the Yacht Club to avoid the effect of its own negligence.

(2) Even if it were a proper disclaimer of negligence, under appropriate construction the exculpatory language does not apply to the facts of the present cause since the damage for which the appellants seek remedy did not occur on the "premises" of the Yacht Club.

(3) As a matter of law the appellee Yacht Club was barred from employing the said exculpatory language because it had assumed the duties of a bailee of appellants' vessels.

(4) In moving the appellants' vessels without permission, the appellee converted them.

(5) As to appellant Elliott, the exculpatory provision is invalid as he did not sign it and his execution of it may not be implied.

Upon each of these grounds the appellants submit that the Trial Court's decree should be reversed, and

that a decree should be entered in the appellants' favor for the damages found in the Court below.

Respectfully submitted,

RICHARD F. ALLEN
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Proctors for Appellants

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with these rules.

RICHARD F. ALLEN
of Proctors for Appellants